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No. 956

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HARNISCHFEGER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the District Court (R. 68) is reported at 54 F. Supp. 326. The opinions of the Circuit Court of Appeals (R. 81–87) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1944 (R. 88). The petition for certiorari was filed February 17, 1945, and granted April 2, 1945. The jurisdiction of this Court is based upon Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the payment of overtime at one and one-half times an hourly rate labelled by contract as the "regular rate" of pay meets the requirements of Section 7 of the Fair Labor Standards Act despite the fact that the contract rate is not the actual rate of hourly compensation but excludes piece work and other "incentive" payments earned by approximately 98½ percent of the employees involved ~~and~~ which amount to about 22 percent of their earnings exclusive of overtime.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section], unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The facts are adequately set forth in the findings of fact and conclusions of law entered by the District Court (R. 70–74) and are not disputed. They may be summarized as follows:

Respondent is a Wisconsin corporation engaged at West Milwaukee, Wisconsin, in the manufacture, production, sale and distribution of electric cranes, hoists, motors, welders, power excavating machines, welding electrodes, housing panels and other heavy electrical products, substantial quantities of which are shipped interstate (R. 70–71). It is admitted that respondent's employees are covered by the Act.

Respondent's production employees are classified into two groups called "incentive workers" and "non-incentive workers." Approximately 1,250, or 50 percent, of the production workers are incentive workers (R. 71). They are the only employees involved in this case. By agreement with a union representing its employees, respondent compensates the incentive workers on a piece work system with a minimum hourly guaranty. This method of payment is described in some detail in a stipulation of facts (R. 7–19) but its essential elements are these: The various jobs performed by the incentive workers are "time studied" by the management. The time which a job is shown to consume is multiplied by a

"standard earning rate"[1] per unit of time, and the amount so obtained is known as the "price" placed on that job. Whenever an employee is given work on a job which has been "priced" in the manner described, he receives a job card bearing the "price," and he is paid for his work the amount that he earns at these piece rates or "job prices." Each incentive worker, however, is also assigned a "basic hourly rate",[2] which he is guaranteed as a minimum for all hours of employment. The consequence is that although an incentive worker is paid all that he may earn at the piece rates, he never receives less than his base rate of pay. For this reason respondent's method of compensation may be described "as a piece work system with a minimum hourly guaranty"[3] (R. 69).

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[1] The hourly rate of pay which workers generally in the Milwaukee area receive for that type of work. (Fdg. V, R. 72.)

[2] This term "basic hourly rate" and its equivalent "base rate" are the expressions used in the Harnischfeger contract and, consequently, in order to avoid cumbersome circumlocutions, we have continued to use them to describe the rate per hour guaranteed as a minimum. The use of these terms in this brief does not imply that the "basic hourly rates" here could be regarded as "basic hourly rates" under Section 6 of the Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U. S. C. 35; 40. We respectfully suggest, moreover, that the Court may wish to guard in its opinion against the confusion of these terms.

[3] At various points in the record the difference between the employees' earnings at the piece rates or job prices and the amounts they would have earned at their base rates have been described as piece work or incentive bonuses or simply as bonus payments.

As a matter of fact the incentive worker nearly always performs his jobs with sufficient speed to earn more at the piece rates or job prices than he would earn at his basic hourly rate. Hence, he is nearly always paid not at his basic hourly rate but at the piece rates or "prices" set on his jobs (R. 72–73). On each pay day about 98½ per cent of all incentive workers have received compensation over and above their base rates (R. 72). Incentive payments make up 22 percent of each payroll, excluding overtime (R. 72–73). In other words, for each pay period, the incentive workers as a group have received total compensation, exclusive of overtime payments, approximately 28 percent in excess of the amount they would have received at the basic hourly rates. Indeed, if a piece rate worker does not make "his average high earning rate" on "single piece or small order jobs" as a result of conditions beyond his control, he is entitled under Section 3 (j) of the contract to have an adjustment made to yield him his average premium in excess of the base rate (R. 12).

On a "great number of jobs" which have not been "time studied," the company has contracted to pay, and does pay, each incentive worker an hourly rate at least 20 percent higher than his basic hourly rate[4] (R. 72). Likewise, whenever

[4] In fact since March 16, 1942, the company has agreed to pay for such work the still higher "average hourly earnings" (R. 61).

an incentive worker is temporarily assigned to day work,[3] he is paid at least 20 percent more than his basic hourly rate (Sec. 3 (h), R. 12). Under Section 13 (d) of the contract vacation pay is based on the employee's average hourly straight time earnings over a three-month period and not on his base rate (R. 18). Hence it appears that the basic rate is not intended to represent normal earnings, but rather a conservatively-estimated basis upon which the incentive system may operate.

Respondent's incentive workers frequently work in excess of the maximum number of hours a week specified in Section 7 of the Act. Respondent pays them overtime premiums of only one-half their basic hourly rates. This method of compensating workers for overtime has been in effect since 1933 and no change in the basis for computing overtime was made in 1938 when the Fair Labor Standards Act became effective (R. 55–56). Notwithstanding the fact that the incentive earnings form the actual compensation of approximately 98½ percent of the incentive workers and exceed the base rates by an average of 28 percent, the employees' piece rate earnings over and above their base rates have not been included in computing overtime premiums for piece rate employment. Likewise, when the incentive workers

[3] Day work is work paid for on an hourly as distinguished from a piece basis (R. 36).

are on hourly rates, respondent pays them overtime calculated on their basic hourly rates and not on the 20 percent higher hourly rates actually paid them for non-overtime hours. The way in which this system operates when overtime is worked may be illustrated by the following examples:

Example 1

An incentive worker is assigned a basic hourly rate of $1 an hour. He works 50 hours a week at a constant rate of production, spending all his time on jobs which have been time-studied and given a "price" of $5. He completes 15 jobs in the 50 hours and therefore earns $75. Respondent pays him $75 plus extra compensation for 10 hours of overtime. Respondent computes this premium at 50 per cent of the employee's arbitrary basic rate of $1 an hour ($10\times.50\times\$1=\$5$), giving a total for the week of $80. Actually, this worker in fact was receiving compensation at the rate of $1.50 an hour ($75÷50 hours); and if the premium for overtime had been computed on the actual rate of $1.50 an hour, it would have amounted to $7.50, giving a total for the week of $82.50.

Example 2

An incentive worker is assigned a base rate of 75 cents an hour. He is employed for a 50 hour workweek on jobs which have not been time-

studied. Accordingly, under the employment contract, he is paid, exclusive of the overtime premium, 90 cents an hour for all hours, an hourly rate 20 per cent above his base rate. For the overtime premium, however, respondent pays only one-half the 75 cent base rate. Thus, this worker receives—

50 hours at 90 cents	$45.00
10 hours premium compensation at 37½ cents	3.75
Weekly earnings	48.75

If respondent had paid a premium for the overtime hours at one-half the 90-cent hourly rate which the worker was promised by the contract of employment and actually received for each of the 50 hours that he worked, the computation would have been—

50 hours at 90 cents	$45.00
10 hours premium compensation at 45 cents	4.50
Weekly earnings	49.50

Respondent's method of computing overtime, as these illustrations show, is based on an arbitrary rate which does not take into account the full actual earnings of the employees, which are at least 20 per cent higher. Accordingly, the Administrator brought an action under Section 17 of the Act to compel compliance with Section 7. Respondent admitted its practice but sought to justify it under the following provision in its collective bargaining agreement (Sec. 3 (e); R. 11, 71)—

> * * * the parties agree that, for all purposes, the regular rate of pay at which

> each employee who participates in an incentive plan is employed, is the base rate of each such employee.

Respondent contended that this contractual provision must be accepted for the purposes of Section 7 under the statement of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, 631, "that as a matter of law employer and employee may establish the regular rate by contract."

The District Court decided that respondent was violating the Act by excluding from the computation of overtime the piece rates actually paid. In his written opinion, Judge Duffy said that he was "convinced that the court did not intend" in the *Belo* case "to convey the idea that after the parties had worked out and agreed upon the compensation to be paid, they could then agree what the 'regular rate' would be for overtime purposes." (R. 70).

The Circuit Court of Appeals reversed this decision (R. 88). It held that an employer and his employees are free to fix by contract the "regular rate" on which overtime shall be computed even though the rate thus established is intended to be, and is, less than the rate at which the employee is actually employed, "provided * * * they act in good faith and respect the minimum of wages * * * fixed by the statute." (R 85). Judge Minton dissented, holding that "the 'regular rate' is to be determined by what the parties do and not by what they contract to do" (R. 87).

SPECIFICATION OF ERRORS

1. The court below erred in holding that the "base rates" of the incentive employees of respondent are their "regular rates" of pay for the purpose of computing overtime under Section 7 of the Fair Labor Standards Act, thereby excluding piece work "incentive" payments and other additional payments which constitute part of the normal compensation of approximately 98½ per cent of them.

2. The court below erred in reversing the decree of the District Court and directing dismissal of the complaint.

ARGUMENT

BY EXCLUDING THE "BONUS" PART OF THE EARNINGS OF INCENTIVE WORKERS FROM THE BASE UPON WHICH OVERTIME PREMIUMS ARE COMPUTED, RESPONDENT FAILS TO COMPLY WITH SECTION 7 OF THE FAIR LABOR STANDARDS ACT

Section 7 of the Fair Labor Standards Act provides that no employee may be employed in commerce or in the production of goods for commerce for more than 40 hours a week unless he is compensated for the overtime hours "at a rate not less than one and one-half times the regular rate at which he is employed." That provision applies to workers on "piece rate and incentive systems" as well as to workers paid on an hourly rate. *United States* v. *Rosenwasser*, 323 U. S. 360, 361–362. In *Walling* v. *Helmerich & Payne*,

Inc., 323 U. S. 37, 40, this Court held that although "the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek." In our brief in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, No. 955, this Term, we have discussed the principles underlying Section 7 and have shown that the interpretation adopted in the *Helmerich & Payne* decision applies equally in the case of piece rate workers; they must be paid for overtime at not less than one and a half times their actual rate of earnings at the piece rates, or else at not less than one and a half times the piece rates paid during normal non-overtime hours.

It follows that Harnischfeger does not comply with Section 7 merely by paying a 50 per cent premium for overtime calculated on the "base rates" assigned to the incentive workers. The record establishes beyond question that although a few workers receive only the basic hourly rates guaranteed as a minimum,[6] in nearly all instances the piece rates or "job prices" make up the incentive workers' actual compensation and thus determine the regular rates at which they are in fact employed. Each pay day 98½ per cent of the incentive workers receive some compensation over and above the base rates. The amount of

[6] There is no dispute that as to such workers Section 7 (a) is complied with by the payment of one and one-half times the basic hourly rate as the contract provides.

the excess (sometimes called the "incentive bonus") varies from employee to employee; but since 22 per cent of each pay roll is made up of bonuses, the average worker's actual hourly earnings exceed his base rate by 28 per cent (R. 72–73, fdg. VIII).

Other provisions in the contract also show that Harnischfeger and its employees intended that the employees' base rates should not be their actual compensation:

(1) Whenever an incentive worker is performing one of the "great number" of jobs for which a time study has not been completed, he is entitled under Section 3 (h) of the collective bargaining agreement to be paid an hourly rate at least 20 per cent higher than his guaranteed base rate (R. 72, fdg. VII; R. 12).[7]

(2) Section 3 (i) provides that when an incentive worker is requested to do ordinary day work "he shall receive a premium of not less than twenty (20%) per cent over his hourly base rate" (R. 12). Although the incentive workers are seldom put on day work, the presence of this clause in the contract is strong evidence that they regard the piece rates and their piece work earnings as the regular compensation for which they are employed.

[7] Respondent's work manager testified that it "would not be fair" to ask a man who was earning more than the base rate at piece jobs to work for "only his base rate" at jobs which were not priced (R. 47).

(3) Similarly, although there may never have been any occasion for the employees to invoke Section 3 (j) of the contract, which promises adjustments in piece rates on small order jobs in order to enable any worker so assigned to maintain "his average high earning rate," the very fact that the workers bargained for such a provision shows that the base rates were known to be substantially lower than their normal rates of pay.

(4) Section 3 (g) of the employment contract makes it plain that employees are expected to earn substantially more at piece rates than their base rates. The respondent agreed not to cut established piece rates "even though the employee is able to turn in as much as twenty (20%) per cent over the standard earning rates." (R. 12.)

(5) The contract grants vacations with pay and provides for payment for the vacation period at the "average hourly earnings", not at the base rates. (Section 13, R. 18; R. 8.)

These provisions of the collective bargaining agreement as well as the actual payments made under it, show that the contract was intended to, and really did, fix the piece rates as the actual rates of pay during the normal non-overtime workweek for the 98½ per cent of the incentive workers whose earnings at the piece rates exceed the minimum hourly guaranty. The piece rates, therefore, were the "regular rates" at which the incentive workers were employed and, under the decisions in *Walling* v. *Helmerich & Payne, Inc.*,

supra, and *United States* v. *Rosenwasser*, 323 U. S. 360, Harnischfeger is required to use those rates in computing the overtime premium. Cf. *Walling* v. *Stone*, 131 F. 2d 461, 464 (C. C. A. 7) (holding that under "a piece rate system with a minimum hourly guaranty," the difference between the actual piece work and the guaranteed minimum "ought to be included, in determining the 'regular rate' under § 7").

Harnischfeger seeks to justify its present method of calculating overtime from the base rates and not the actual rates on the ground that Section 7 leaves the parties to an employment contract free to agree upon the regular rate of pay. From this premise it is argued that Harnischfeger is free to fix the base rates as the regular rates for purposes of Section 7 even though they are 22 percent less than the actual rate of compensation for normal, non-overtime employment.[8] This contention is essentially the same as that advanced by the respondent in *Walling* v. *Youngerman-Reynolds Harwood Co.*, *supra*, and is equally untenable. For reasons which we have stated more fully in our brief in that case, it is clear on both

[8] We use the term "the actual rate of compensation for normal, non-overtime employment" without discrimination to cover either the rate of an employee's compensation for the entire week excluding only overtime premiums, or his rate of compensation for the first 40 hours. Theoretically there may be a difference between the two. However, the question is not involved in this case or in No. 955, now before the Court; for so far as either record shows, the rate is the same whichever way it is computed.

principle and authority, (1) that Section 7 refers to the rate at which an employee is in fact paid[9] for normal, non-overtime employment and (2) that once this actual rate of compensation is fixed by agreement, the parties may not contract that a different rate shall be used as the "regular rate" for the purposes of Section 7. Consequently, after Harnischfeger and the union representing its employees had agreed that the piece rates should be the actual basis of compensation for regular non-overtime employment in the case of any worker who earned more than the minimum hourly guaranty, they could not set aside the provisions of Section 7 by agreeing that the base rate should be treated as the regular rate for the purpose of computing overtime.

The opinion in *Walling* v. *Helmerich & Payne, Inc., supra,* is explicit on this point. This Court there said (p. 42):

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between em-

[9] Respondent emphasizes that the language of Section 7 (a) is "the regular rate *at which he is employed*," not the regular rate at which the employee is *paid*. (Br. in opposition, p. 3). But this Court held in *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 40, that the words regular rate "obviously mean the hourly rate actually paid for the normal, non-overtime work-week."

> ployer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

That the base rate was specified to be controlling, instead of the actual hourly earnings, in a contract arrived at by collective bargaining is of no legal significance. The Act carefully limits, by Section 7 (b), the circumstances under which the requirements of Section 7 (a) can be superseded by collective bargaining agreement. See *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, 602–603.

The two differences between the *Harnischfeger* system and the *Youngerman-Reynolds* contracts, to which respondent may point, are not significant. One is that Harnischfeger pays a premium for overtime employment over and above the incentive workers' piece rate earnings whereas Youngerman-Reynolds treats the piece rate earnings as including both the fictitious regular rate and

overtime compensation. Obviously this is a difference only in the degree to which Section 7 has been violated; for Section 7 requires not merely that an overtime premium be paid but that the premium be at least 50 percent of the regular rate of compensation. The Harnischfeger arrangement is no different in principle from an arrangement which provides that overtime shall be paid at one and one-third or one and one-fourth times the regular hourly rate of earnings. The examples given at pp. 7–8, *supra*, show that the premium computed by Harnischfeger is not enough to meet the requirements of Section 7.[10] In the first illustration in Respondent's Exhibit No. A (R. 66–67) the worker receives approximately one and one-third times his non-overtime earning rate for overtime hours (1-35/100 x 1.00, his hourly rate). In the second illustration Man "A" earned $20 for 25 hours work or 80¢ an hour. He received an overtime premium of 32¢ an hour or 2/5 of the hourly rate. He has therefore been paid only time and two-fifths for overtime hours.

Second, Harnischfeger argues that under its incentive system the "basic hourly rates" do have

[10] It is to be noted that the non-incentive production and the non-production employees of Harnischfeger receiving straight hourly wages have their overtime premium computed upon their total hourly compensation and not merely upon a part of their earnings as in the case of incentive workers. (Sec. 4 (a), R. 13.) So too, workers on night shifts have their differentials of 5¢ and 8¢ an hour included in the base for overtime computations. (Sec. 4 (d), R. 14; R. 42.)

some practical significance whereas in the *Youngerman-Reynolds* case the so-called "regular rate" has none. It is true, as respondent points out, that the Harnischfeger base rates are used to determine the employees' compensation when they are called in and work is not available (R. 14) or to compensate them for lost time when they are reinstated to positions from which they have been improperly discharged (R. 17). It is doubtless for these reasons as well as because they are often paid hourly rates 20 per cent above their base rate that the incentive workers from time to time seek increases in their base rates of pay. It is not our contention that the base rates were included in the collective bargaining agreement for the purpose of circumventing Section 7,[21] although we know of no other reason for labelling them as the "regular rate for all purposes". Our position is that when the workers earn at the piece rates more than the base rates, the piece rates must be used to determine the "regular rate" of pay. The practical significance which a rate may have on some occasions does not justify using it in computing overtime for periods when it does not represent actual earnings, instead of the actual rate of compensation to which Section 7 so plainly refers.

In some respects the present case illustrates the fault in the respondents' arguments even more

[21] We have noted above that the method of overtime compensation here involved has been employed by respondent without change since 1933, which may explain the failure of the contract provisions to satisfy the overtime requirements of the Act.

clearly than the *Youngerman-Reynolds* controversy. There is no pretense in the Harnischfeger plan that any part of the incentive payments are allocable to overtime. Unlike Youngerman-Reynolds, Harnischfeger attempts to break an hourly wage into two parts and treats one part as the regular rate of pay, excluding the other. Thus, there are a great many jobs performed by incentive workers in the Harnischfeger plant for which no piece rates have been set. On such occasions they are paid hourly rates at least 20 percent higher than their basic rates of pay (R. 86). An incentive worker whose base rate is 75 cents an hour, for example, will receive the sum of 90 cents an hour, hour after hour and week after week, so long as he is performing work for which no piece rates have been established. Obviously, 90 cents an hour is the "regular rate" at which this employee is employed, notwithstanding the provision in the contract reciting that the 75-cent base rate shall be the regular rate "for all purposes", and the legislative policy underlying Section 7 can be achieved only by calculating the 50 percent premium on that basis. By treating 75 cents as the regular rate of pay, Harnischfeger employs such workers for more than 40 hours a week without paying the full overtime premium to the employees and without incurring the full 50 percent increase in labor costs which Congress intended.

Since we have discussed *Walling* v. *Belo Corp.*,

316 U. S. 624, in our brief in the *Youngerman-Reynolds* case, it is enough here to point out that two factors, either of which alone would be sufficient, distinguish the *Belo* case from those now before the Court. First, it is clear that the statement in the *Belo* opinion that the "employer and employee may establish the 'regular rate' by contract" [12] means only that the Act leaves the employer and employees free to work out the actual rate at which the employees will be compensated for their regular hours of work; for the Court held only that "the contracts were 'actual bona fide contracts of employment' and that 'they were intended to, and did, really fix the regular rates at which each employee was employed'" (316 U. S. at 629–630). In the instant case, the piece rates were the actual rates of pay fixed by the collective bargaining agreement except on those few occasions when incentive workers earned less at those rates than the base rates guaranteed as a minimum. Second, the *Belo* contract was sustained as a means by which employers and employees could fix an actual, regular hourly rate of pay and still secure a fixed weekly income for employees whose hours of work fluctuated greatly. The Harnischfeger contract has no such provisions.

The guaranty to which respondent refers as the equivalent of the security of the fixed weekly wage in the Belo plan is merely a guaranty of a

[12] 316 U. S. at 631.

minimum hourly rate. It does not assure any stability in weekly earnings. The employment arrangement in *Walling* v. *Helmerich & Payne* was condemned by this Court even though it assured a fixed daily wage.

The respondent is seeking to continue a scheme of overtime payments in force since 1933 and framed without regard to the requirements of the Fair Labor Standards Act, whereby it avoids payment of the full overtime premium required by the Act.

CONCLUSION

An employer's actual wage bill, exclusive of overtime premiums, determines the "regular rate" of pay. He cannot circumvent the statute by calling one part of that wage bill a "basic hourly rate" and another part an "incentive bonus".

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted.

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